

## FINAL QUESTIONS for ATTORNEY GENERAL

1. Does the State Board of Education have clear authority to develop and write definitions based on its own expertise on the education voucher issue?
  - A. In developing the rules, could staff use information about successful and unsuccessful voucher programs in other states to develop definitions?
  - B. Legally, could USOE-developed definitions rely on and reference legislative intent of HB 148?
  - C. The definition is missing, but there is some description of “eligible private schools” in Section 53A-1a-805, can and/or should the Board enhance this section with a definition?
  - D. Is the Board in a stronger or weaker legal position if it relies on previous legislative intent (that technically disappears with HB 148) or if it develops definitions consistent with its experience and expertise?
  - E. The following are examples of crucial, but now undefined, terms (references are to line numbers in HB 174):
    - (1) What does “adopt”(line 256) mean?
    - (2) How should “private school” (line 43, line 83) be defined?
    - (3) How should “scholarship student” (line 84) be defined?
    - (4) How should “income” (line 49) be defined?
    - (5) How “parent” (line 54) be defined?
2. Does the State Board of Education have clear constitutional and statutory authority to fill in missing, necessary definitions—some of which were **never** included in HB 148—including, but not limited to, “eligible student,” “tuition,” “agreed upon procedures,” and “audit?”
3. What are the legal ramifications of a statutory mandate to the Board to create rules for a section of Utah Code that was stayed by the referendum of HB 148? HB 174 requires the Board to make rules implementing 53A-1a-807, which does not exist in HB 174. Can the Board safely ignore the statutory mandate?
4. While trying to resolve the statutory mandate of #3, above, the State Board may miss the statutory requirement of HB 174 “By May 15, 2007, the board shall adopt rules establishing. . .”. What are the legal ramifications of missing this deadline?

- A. What is the conflicting (supporting and contrary) legal authority for not implementing rules by May 15, given the intervening referendum sufficiency?
  - B. Is failure to implement on the required date a mandate to be interpreted strictly, given notice to the Board of the referendum sufficiency on April 30, 2007, three days before the State Board meeting?
- 5. The Lieutenant Governor's announcement on April 30, 2007 of sufficient signatures for HB 148 to be referred to the voters also stayed the implementation of HB 148. The stay of HB 148 also removed all General Fund money allocated to the Board of Education/Utah State Office of Education for administrative work on HB 148. Even if the Board agrees with the Attorney General that funds may be requested under SB 3, Item 135 to implement an "Education Voucher Program," those funds are not available until July 1, 2007. Funds appropriated in HB 174 are available beginning July 1, 2007. What constitutional limitations and/or risks does administrative work on an education voucher program for which no General Fund appropriations are available pose for the State Board of Education and/or the USOE?
- 6. What state and federal constitutional issues does the omission of the purpose language that the law "was enacted for the valid secular purpose of tailoring a child's education to that child's specific needs as determined by the parent; (b) neutral with respect to religion" raise?
  - A. Does the Board have the constitutional and statutory authority to write administrative rules, adopt policies, develop definitions to ameliorate this concern?
  - B. Does the omission of the language pose a genuine constitutional question or is the language reassuring surplus verbiage?
  - C. Is the State Board in a stronger or weaker position, should there be constitutional challenges, if the Board incorporates the language into its rules or ignores the language as vestiges of HB 148?
- 7. May the State Board, as it develops definitions, prohibit eligible private schools from discriminating against students with disabilities?
  - A. Could State Board rules require or allow for public schools to work with eligible private schools to provide specific student services, consistent with *Agostini v. Felton* and *Wolman v. Walter* and related cases?
  - B. Could the State Board rules require eligible private schools to comply with the Americans with Disabilities Act in order to adequately accommodate students with disabilities?
- 8. What legal effect does the title to HB 174 have, as well as numerous references to "amendments" or "modifications," on the analysis that HB 174 stands alone given Utah Supreme Court precedent that the title *may* be an interpretive tool? What is the legal effect

of the bill's title, given statutory language that Legislative Research has authority to change a bill title to more accurately reflect the bill's substance?

9. The Board has received threats of lawsuits if it implements HB 174 AND if it does not implement HB 174. Is the Board in a stronger legal position if it is forced to implement HB 174 by a court? Will the State Board be defended by the Attorney General's Office if it implements HB 174 OR if it waits, completing due diligence in developing a revised rule and considering the threat of litigation, to implement until directed by the court?
10. Would the Attorney General be willing, on behalf of the Board, to seek a declaratory judgment that HB 174 is sufficient to implement a voucher program—should the Board desire to resolve the competing advice through the courts? What is the case law, legally encouraging or discouraging, such an action?
  - A. If a district court ruled, would the Attorney General's Office be willing to appeal as the Board's counsel, at the Board's request?
  - B. If a district court found that HB 174 was NOT sufficient, would the Attorney General's Office vigorously resist pressure from the Legislature or Governor to appeal the decision if the Board, as the client, did not want to appeal? What conflicts of interest might arise for the Attorney General that would need to be reviewed and possibly waived by the State Board?
11. Court deference to agency rulemaking is well established. Consistent with this deference and the State Board's independent constitutional status, will the Attorney General's Office provide representation to the USOE and Board member(s) who are summoned to the Administrative Rules Review Committee hearings to defend the Board's actions?
12. Does the State Board have the legal authority to create reasonable enforcement and penalty provisions, provided in HB 148 but missing in HB 174, for willful misrepresentations, omissions or fraudulent actions by parents or eligible schools seeking to participate in a voucher program?
13. If the Board's authority to create reasonable enforcement/penalty provisions is limited, what are the legal consequences, imposed by whom, for parents or schools that misrepresent information or defraud a state program? Will the Attorney General's Office support the Board, both with expertise and resources, in pursuing these parents and schools and pursue legal action independent of the Board?
14. The section on administrative hearings is missing in HB 174. If State Board definitions and procedures deny a school or parent eligibility, would the absence of administrative procedures result in a denial of due process to parents or schools?
15. If HB 148 stands after the referendum vote and HB 174 has been implemented via the rulemaking process (with additional definitions and requirements), which voucher program prevails? How immediately?

16. The Attorney General Informal Opinion numbered 07-002 suggests that HB 174 could be funded through a statutory provision allowing an agency to request money for a “purpose or function” not specifically identified within the same appropriation item. Does HB 174 have a “different purpose or function” from HB 148 given AG Opinion 07-002 which states that the purpose is essentially the same?
17. Under HB 174, what is the State Board of Education’s legal responsibility if the Office of Planning and Budget refuses the State Board’s request to transfer funds?
18. Utah Code 63-38-3(e) provides that any “department, agency or institution for which money is appropriated” MAY request that the money be transferred. . . . If the Board chooses not to request the transfer, is that within the Board’s prerogative? Would the AG defend the Board’s right to make that discretionary decision?
19. Since the State Board of Education is an independent constitutional body, can the Legislature force implementation of an education program without Board cooperation or without court action? Would the AG represent the State Board if such implementation were undertaken by an unauthorized entity?
20. If the State Board of Education/client is not satisfied with the “Chinese wall” representation from the AG, how will the AG satisfy its responsibility to its client?
21. Does the Attorney General view the Utah State Board of Education and the Utah State Office of Education as separate clients? Is the AG’s Office willing and able to represent both, if the answer is yes?
22. Are the private schools that accept vouchers authorized under HB 148 and HB 174 part of the state’s public education system?
23. Suppose that the State Board of Education accepts the argument, as expressed in your informal opinion numbered 07-002 that the title of HB 174 does not mean what it says, that is, that the word, “amendments,” should be read to mean “repeal” or “bill in the nature of a substitute” or the like. Doesn’t this construction of the title make HB 174 vulnerable to constitutional challenge under Article VI, Section 22, of the Utah Constitution? Please provide and explain the Board’s most defensible action given this uncertainty.
24. The Attorney General’s Informal Opinion numbered 07-002 suggests that certain Board decisions make constitutional challenges more likely. Please identify for the Board members, which specific rule language puts the Board more and less at risk for constitutional challenges.
25. Further clarify how funds can be transferred within SB 3, Item 135. The options provided by the Attorney General’s recent informal opinion seem contradictory in that, if funds can be used interchangeably for HB 148 and HB 174, why would the Board also request a transfer of funds for a “new work program” or request transfer “from one purpose or function to another purpose or function” as explained in Section 63-38-3(e).

## QUESTIONS FOR THE OFFICE OF PLANNING AND BUDGET

1. Item 135 of Senate Bill 3 is an item of appropriation for the Parent Choice in Education Act. That act is now stayed until a referendum determines the viability of the law. If HB 148 is voted down (or repealed) by the people, can its funding be used to implement the provisions of a different, independent bill, HB 174?
2. Does the appropriation for \$100,000 from the General Fund in HB 174 supersede the \$100,000 appropriation in SB3 or is it in addition to that appropriation? Could you provide the Utah State Board of Education/USOE with a definitive statement of the total appropriation available to the USOE to implement HB 174 and the dates when that funding becomes available?
3. Would it be your opinion that if the State Board of Education can transfer funds from HB 148 to HB 174, the State Board of Education can also appropriately transfer funds from the stayed HB 148 to the Carson Smith Scholarship Program (Section 53A-1a-702 et seq.) or the Basic Skills Education Program (Section 53A-1-612), both of which are education voucher programs?
  - A. Would the funds remain in those programs permanently, given that they may be encumbered for eligible students, or would they have to be “returned” to HB 148 should the referendum be defeated?
  - B. Could the funds remain in another education voucher program if HB 148 and/or HB 174 are stayed pending constitutional or other challenges in court?
4. Assuming that Section 63-38-3(e) can be used to “fix” and “fill” the State Board of Education’s apparent appropriations gap, is it not true that the Board must “request” this result from the governor? If so, what criteria should the Board employ in determining whether to make this request? Would the Office of Planning and Budget release the funds relying solely on the Attorney General’s Informal Opinion numbered 07-002 or would the Office of Planning and Budget seek another or other opinions prior to releasing the funds? In short, how long would the process take for the State Board of Education to be assured of funding if it determines to make the request?
5. Does the Office of Planning and Budget concur with the Attorney General’s Informal Opinion numbered 07-002 that the State Board of Education could legally ask for a transfer of monies “from one purpose or function to another purpose or function within an item of appropriation?” In your opinion, is a transfer of monies from HB 148 to HB 174 a transfer “from one purpose or function to another purpose or function” within the meaning of this statute? If your answer is “yes,” then how does this reconcile with the Attorney General’s Informal Opinion that appears to conflate the purpose and function of HB 148 with the purpose and function of HB 174?
6. Senate Bill 3 appropriates \$100,000 to HB 148. HB 148 is currently stayed by the people’s

referendum. Is it your opinion that the \$100,000 appropriated for HB 148, in SB 3 which is a separate bill from the referred bill, is still available to the Utah State Office of Education to do administrative work on HB 148?

- A. Would the funds be equally available for the separate bill, HB 174, not identified in SB 3, Item 135?
- B. If the funds are available solely for the bill specifically identified in SB 3, Item 135, would it be your opinion that the Utah State Office of Education has no funding available for implementation of an education voucher program until July 1, 2007 when funds are available under HB 174, if HB 174 is deemed complete enough (by a court of law?) to implement an education voucher program?
- C. Would your office be willing to provide an affidavit that you authorized the Utah State Office of Education (or refused to authorize the USOE) to use funds specifically appropriated for an identified bill to be used for a different bill?
- D. Or would you provide such an affidavit authorizing the Utah State Office of Education to use funds not appropriated until July 1, 2007 to do administrative work in preparation for a prospective education voucher program?

## QUESTIONS FOR THE DIVISION OF FINANCE

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